

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 763**

[OPPTS-62114; FRL-4044-2]

**Asbestos; Manufacture, Importation, Processing and Distribution Prohibitions; Effect of Court Decision****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Continuing restrictions on certain asbestos-containing products.

**SUMMARY:** On October 18, 1991, the United States Court of Appeals for the Fifth Circuit, in *Corrosion Proof Fittings v. EPA*, No. 89-4596, slip op. 558 (Oct. 18, 1991), vacated and remanded most of the rule which prohibited the manufacture, importation, processing, and distribution in commerce of certain asbestos-containing products, and required the labeling of those products. Subsequently, the Court clarified the decision and held that the rule continued to govern asbestos-containing products that were not being manufactured, imported, or processed on July 12, 1989. This document identifies products that EPA believes may remain subject to the prohibition and labeling requirements of the rule, and solicits comments on EPA's determinations with respect to the status of various other asbestos-containing products as of July 12, 1989.

**DATES:** Comments must be submitted to EPA on or before May 4, 1992.

**ADDRESSES:** Written comments that contain information claimed as Confidential Business Information (CBI) should be identified by the docket number [OPPTS-62114] and submitted in triplicate, together with one version from which all claimed CBI has been deleted, to: TSCA CBI Docket Office (TS-790), Office of Pollution Prevention and Toxics, rm. E201, 401 M St., SW., Washington, DC, 20460. Written comments that contain no claimed CBI should be submitted to: TSCA Public Docket Office (TS-793), Office of Pollution Prevention and Toxics, rm. G004, NE Mall, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

**FOR FURTHER INFORMATION CONTACT:** David Kling, Acting Director, TSCA Assistance Division (TS-799), Office of Pollution Prevention and Toxics, rm. E-545, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460, Telephone: (202) 260-1404, TDD: (202) 554-0551.

**SUPPLEMENTARY INFORMATION:****I. Background**

On July 12, 1989, EPA issued a final rule under section 6 of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2605. The rule prohibited, at staged intervals, the future manufacture, importation, processing, and distribution in commerce of almost all asbestos-containing products, and required labeling of such products (40 CFR 763.160-763.179). The first stage of the ban regulated any "new uses of asbestos," and certain specifically identified asbestos-containing products. "New uses of asbestos" means those commercial uses of asbestos not identified in 40 CFR 763.165, and not excluded specifically by the definition, the manufacture, importation, or processing of which would be initiated for the first time after August 25, 1989 (40 CFR 763.163). After August 27, 1990, the rule banned the manufacture, importation, and processing of all stage one products, and required that those products be labeled while they remained in distribution (40 CFR 763.165(a), 763.167(a), 763.171(a)). After August 27, 1992, the rule also prohibited the distribution in commerce of all stage one products (40 CFR 763.169(a)). The second and third stages of the ban regulated additional types of asbestos-containing products. These two later stages of the rule contained provisions that were comparable to the first stage, but that were to take effect from 1992 through 1997 (40 CFR 763.165(b)-(e), 763.167(b) and (c), 763.169(b)-(d), 763.171(b) and (c)).

In *Corrosion Proof Fittings*, the Court agreed with EPA's determination that asbestos is hazardous and presents similar risks throughout different industries, and affirmed the Agency's authority to issue rules that ban all uses of a toxic substance under TSCA. The Court, however, held that the asbestos ban rule was not supported by substantial evidence because EPA failed to sustain its burden under TSCA section 6(a) of showing that the products banned by the rule present an unreasonable risk, and that a less burdensome regulation would not adequately protect against that risk. The Court also found that EPA failed to give adequate notice and opportunity to comment on the use of analogous exposure data to support parts of the rule. For products that "once were, but no longer are, being produced," however, the Court found that EPA properly evaluated the risks. *Id.* at 590-591. It held that TSCA authorizes EPA to ban future uses of asbestos, and specifically refused to "disturb the agency's decision to ban products that

no longer are being produced in or imported into the United States." *Id.* at 591.

EPA filed a Motion for Clarification with respect to the effect of the Court's decision on the portions of the rule that regulate asbestos-containing products that were no longer being produced or imported. In response to the Motion, the Court stated that its earlier holding not to disturb EPA's decision to ban certain products applies to "products that were not being manufactured, imported, or processed on July 12, 1989," the date the final rule was issued. *Corrosion Proof Fittings*, slip op. at 1007 (November 15, 1991). It also authorized EPA to resolve factual disputes with respect to the particular products that may be in that category. *Id.* In light of this clarification, it is clear that the Court did not disturb the rule with respect to products that were originally covered by the rule, and that were not being manufactured, imported, or processed on July 12, 1989. The Court did not require the Agency to go through an entirely new rulemaking process for these products. It did, however, recognize that there may be some disagreements regarding the status of some products, and it authorized EPA to resolve such factual disputes on remand.

EPA also filed a Request for Rehearing, which the Fifth Circuit denied on November 27, 1991. The Government has decided not to file a petition for a Writ of Certiorari to the United States Supreme Court.

**II. Status of Products**

Based upon the Court's clarified decision, EPA believes that new uses of asbestos, vinyl/asbestos floor tile, and asbestos flooring felt products are still subject to the rule. By definition, any product that constitutes a "new use of asbestos" was not being manufactured, imported, or processed on July 12, 1989. A "new use of asbestos" is defined as a use that is initiated for the first time after August 25, 1989 (40 CFR 763.163). Based upon this definition, any product that was being manufactured, imported, or processed on July 12, 1989, automatically cannot be a "new use" of asbestos because it would have been initiated prior to August 25, 1989. Thus any product that is a "new use of asbestos" was not being manufactured, imported, or processed on July 12, 1989, and continues to be governed by the rule pursuant to the Court's clarified decision (40 CFR 763.163).

The information available to EPA as part of the rulemaking proceeding also establishes that vinyl/asbestos floor tile and flooring felt were not being

manufactured, imported, or processed when the final rule was issued. EPA made such a determination in the preamble to the final rule (54 FR 29460, 29484, 29492, July 12, 1989), and in the Regulatory Impact Analysis of Controls on Asbestos and Asbestos Products. That determination was later substantiated in part by statements made to the Fifth Circuit Court of Appeals by the Asbestos Information Association of North America (AIA) and the Asbestos Institute (AI), which represent members of the asbestos industry. The two organizations told the Court that vinyl/asbestos floor tile and flooring felt were no longer produced in the United States. Recent communications from AIA, AI, and other entities, however, raise some questions about the status of these products. Therefore, EPA is requesting comments with respect to whether these products were being manufactured, imported, or processed on July 12, 1989.

Based upon information currently available to the Agency, EPA also believes that the following products may be subject to the rule: asbestos-cement (A/C) corrugated and flat sheet, A/C shingle, and asbestos clothing, flooring felt, pipeline wrap, roofing felt, commercial, corrugated and specialty paper, rollboard, and millboard. Both the AIA and the AI stated in their appeal to the Fifth Circuit that these products were not in production at the time the final rule was issued. Recent EPA efforts also indicate that these products probably were not being manufactured, imported, or processed when the final rule was issued, and the Agency is soliciting comments with respect to their status as of July 12, 1989.

Finally, there may be other asbestos-containing products identified in the rule that were not being manufactured, imported, or processed on July 12, 1989, and which therefore may continue to be subject to the rule. In the original rulemaking proceeding, EPA did not identify the status of every asbestos-containing product as of July 12, 1989. Accordingly, EPA seeks information concerning whether any of the other asbestos-containing products, which were identified in the rule but not discussed in the preceding paragraphs of

this document, were being manufactured, imported, or processed on July 12, 1989.

Commentators submitting information with respect to the July 12, 1989, status of asbestos-containing products should provide supporting documentation for any claims of manufacturing, processing, or importing as of that date. Such documentation may include records of customs declarations, or evidence of manufacturing or processing on the pertinent date.

As soon as possible after reviewing the comments, EPA will determine which asbestos-containing products were not being manufactured, imported, or processed as of July 12, 1989. The Agency will issue its determination in the **Federal Register**, and identify the products, in addition to new uses of asbestos, that continue to be governed by the prohibition and labeling requirements of the rule. The second notice also will provide information, to the extent that it is available to the Agency, on products that are not subject to the rule, including a list of specific asbestos-containing products and of the companies that were manufacturing, importing, or processing the products on July 12, 1989.

### III. Comments Containing Confidential Business Information

All comments will be placed in the public record unless the commentator claims that they contain CBI, and the comments are clearly labeled as containing claimed CBI when they are submitted. Because of the need to expedite this process, CBI claims should be accompanied by comments substantiating the claim as described in 40 CFR 2.204(e)(4). While a part of the record, CBI comments will be treated in accordance with 40 CFR part 2. A sanitized version of all CBI comments should be submitted to EPA for the public file.

It is the responsibility of the commentator to comply with 40 CFR part 2 so that all materials claimed as confidential may be properly protected. This includes, but is not limited to, clearly indicating on the face of the comment (as well as on any associated correspondence) that information

claimed to be CBI is included, or marking "CONFIDENTIAL," "TSCA CBI," or a similar designation on the face of each document or attachment in the comment which contains the claimed CBI. EPA will consider the failure to clearly identify the claimed confidential status on the face of the comment as a waiver of any such claim and will make such information available to the public without further notice to the commentator or business.

### IV. Record

EPA has established a record (docket number OPPTS-62114) for comments submitted pursuant to this document, and for other comments regarding the July 12, 1989, status of asbestos-containing products received by EPA before this document but after the Fifth Circuit decision. The Agency will supplement this record as necessary. A public version of the record, from which all CBI has been deleted, is available for inspection in the TSCA Public Docket Office, rm. G004, NE Mall, 401 M St., SW., Washington, DC, from 8 a.m. to noon and from 1 p.m. to 4 p.m., Monday through Friday, except legal holidays.

EPA has placed copies of the Fifth Circuit Court's decision, dated October 18, 1991, and Clarification of the decision, dated November 15, 1991, in Docket OPPTS-62114 for public review. These documents are:

1. Decision of the U.S. Court of Appeals for the Fifth Circuit in *Corrosion Proof Fittings, et al., petitioners, -vs- The Environmental Protection Agency and William K. Reilly, Administrator, respondents*, No. 89-4596 (5th Cir., Oct. 18, 1991).

2. U.S. Fifth Circuit Court of Appeals Clarification of its Decision in *Corrosion Proof Fittings, et al., petitioners, -vs- The Environmental Protection Agency and William K. Reilly, Administrator, respondents*, No. 89-4596 (5th Cir., Nov. 15, 1991).

Dated: February 28, 1992.

Linda J. Fisher,

Assistant Administrator for Prevention,  
Pesticides and Toxic Substances.

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